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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1025

BURTICE A. HINES, ET AL.

Petitioners

v.

ANCHOR MOTOR FREIGHT, INC., ET AL.

Respondents

BRIEF OF ANCHOR MOTOR FREIGHT, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Opinions Below	2
Statement of Jurisdiction	2
Statement of Facts and the Case	2
Argument	7
Conclusion	19
Certificate of Service	20

CASES CITED

Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167 (5th Cir. 1971)	11
National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S.Ct. 453 (1951)	16
Serra v. Pepsi-Cola, 348 F.Supp. 684, (D.C. Ill. 1965)	11
Vaca v. Sipes, 386 U.S. 171, 17 L. Ed.2d 842, 87 S.Ct. 903 (1967)	8-15

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The Respondent, Anchor Motor Freight, Inc., opposes the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit filed by the petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 506 F.2d 1153 (6th Cir. 1974). The opinion of the District Court was unofficially reported at 72 LC ¶13,987 (N.D. Ohio, 1973).

STATEMENT OF JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

STATEMENT OF FACTS AND THE CASE

Each of the petitioners was formerly employed by Respondent Anchor Motor Freight as a truck driver. In early June, 1967, Anchor discovered that while the petitioners were on overnight trips away from the terminal they were staying in a motel in Batavia, New York and sleeping two and three drivers to a room in order to save expenses, but were submitting receipts for single rooms to

Anchor for reimbursement (R. 314-16). Anchor investigated this matter extensively. The company talked to Anthony Pagano, desk clerk at the motel, who gave the motel's registration cards to Anchor. The cards indicated that the amount which the motel actually collected from the petitioners was less than the amount on the receipts that the petitioners had submitted to Anchor. Pagano gave Anchor an affidavit to that effect. Joseph Repicci, owner of the motel, verified in a sworn statement that the information given by Pagano was correct (R. 317-18, 334,337).

On the basis of the motel registration cards which Anchor had obtained from Pagano, the motel receipts which the drivers had submitted to Anchor for reimbursement of expenses, the Anchor form entitled Summary of Driver Expenses which each driver signed when he presented the

aforementioned motel receipts to the company for reimbursement, the daily logs kept by each driver, plus the sworn statements of Pagano and Repicci confirming that the amounts which the petitioners had paid the motel were less than the amounts stated on the receipts which they presented to Anchor for reimbursement, Anchor determined to discharge the petitioners for dishonesty.

On the date of the discharge, June 5, 1967, a meeting was held at the Anchor terminal between Anchor officials and union officials concerning the discharges (R271-73, 317-18). This was the first step in the contractual grievance procedure. At that meeting the union officials presented the petitioners' defense, i.e., that they were innocent of any wrongdoing, and that in fact the motel clerk was dishonest. This defense was repeated at the hearings before the contractually

established Joint Arbitration Committee in Detroit (R. 345). The committee voted to sustain the discharges. A petition for rehearing was presented to the committee, on the basis of what the petitioners characterized as new evidence in support of their position that Pagano was the person guilty of dishonesty. At that time the union presented the statement of Repicci that his prior statements were based on the records and the information supplied by Pagano and that he had no personal knowledge of the events in question. The committee ruled that insufficient new evidence had been presented, and that the argument that the motel clerk was the culpable party had been presented previously. The petitioners were present and were heard at both hearings (R. 81, 220-23, 346). At the rehearing, the petitioners were represented by both the union and the

attorney for the petitioners who obtained the Repicci statement, which was not inconsistent with any of the first statements. When the committee denied rehearing, on October 26, 1967, the contractual grievance procedures had been fully exhausted and the discharges of the petitioners had been sustained.

There was no evidence to indicate that the discharges had been anything other than for just cause. There had been no allegation of any misconduct by Anchor. The discharges are valid and final.

There is also no dispute that in a deposition taken in 1971 Pagano changed his version of the story. At that time Pagano alleged that it was he who was dishonest, rather than the petitioners. However, the question of Pagano's veracity, as opposed to the veracity of

the petitioners, was in issue throughout the grievance machinery proceedings.

The petitioners also alleged but did not prove that Anchor and the Local Union in some way conspired against the petitioners. Both the District Court and the Court of Appeals held that there was insufficient evidence to substantiate this claim. This is a factual determination.

ARGUMENT

The Decision Of The Sixth Circuit Was Not In Conflict With Either Prior Decisions Of This Court Or The Decisions Of Other Circuits.

Petitioners have alleged that the decision of the Sixth Circuit affirming the summary judgment in favor of Respondent Anchor Motor Freight in this matter is in conflict with prior decisions of this Court and decisions of the other circuits.

It is respectfully submitted that there is no such conflict.

The leading case on the subject of unfair representation and wrongful discharge actions is Vaca v. Sipes, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967). Vaca was a suit against a union alleging unfair representation. The employer was not a party to that suit and the court decided the case on the assumption that the plaintiff had been wrongfully discharged, as the court below had decided (386 U.S. at 193). In Vaca the Supreme Court discussed at great length the union's duty of fair representation and the elements which a plaintiff must prove in order to make out a case against his union for breach of this statutory duty. The Court held that in order for a plaintiff to prevail he must establish that the union's conduct was "arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. These

are the elements of a separate cause of action against a union.

Throughout the Vaca decision, the Court recognized that a suit against an employer for wrongful discharge and a suit against a union for unfair representation are essentially two separate causes of action, although they are closely related. The Court held that "it is now well established that...the Union had a statutory duty fairly to represent all of those employees..." (Id. at 177). However, "the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. §301 charging an employer with a breach of contract." (Id. at 183). The Court stated that "if an employee is discharged without cause, either the union or the employee may sue the employer under L.M.R.A. §301." (Id. at

183). The court recognized that an employer has an additional defense in a breach of contract action if the plaintiff fails to exhaust his contractual remedies, but stated that this defense will not be available if the employee has proved that his union breached its duty of fair representation. The Court held that even if it is necessary for an employee to prove that his union breached its duty of fair representation in order to prevail, "the employee's suit against the employer, however, remains a §301 suit...." (Id. at 186). "And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate action." (Id. at 187). From the foregoing, it is clear that, although closely related, the actions against the union and the employer

in this type of case are separate and distinct causes of action. Neither party is indispensable in the action against the other. Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167,170 (5th Cir. 1971) and Serra v. Pepsi-Cola, 248 F.Supp. 684,688 (D.C. Ill. 1965).

In the instant case the petitioners have alleged that the decision of the Sixth Circuit, the effect of which is to allow the petitioners to go to trial on their breach of duty allegations against the union, but which also affirmed the district court's granting of the employer's motion for summary judgment on the charge of wrongful discharge, is in conflict with Vaca and subsequent decisions of the other circuits which relied on Vaca. This position of the petitioners ignores the substantial and basic distinction between the instant case and the cases cited.

In the instant case, all of the evidence indicates that the company had just cause for discharge. Unlike the cases cited by the petitioners and unlike Vaca v. Sipes, this is not a case involving a wrongful discharge, as it is inconceivable that an employer could be held responsible for allegedly "wrongful" conduct when there was not a scintilla of evidence to indicate that the company's conduct was not absolutely substantiated and warranted by the facts. This was recognized by the Sixth Circuit below when it outlined in a footnote (506 F.2d at 1158) that the "facts" upon which the plaintiffs relied were not sufficient to substantiate their claims against the company. The instant case is one in which there was no wrongful discharge, and the District Court and Court of Appeals recognized that the plaintiffs had not submitted evidence to substantiate

their claim against the company. However, in reversing the summary judgment against the union, the Court of Appeals felt that on the separate cause of action against the local union for an alleged breach of its duty of fair representation, there was sufficient evidence submitted to require that that case be heard. The decision of the Sixth Circuit recognized what this court had expressly stated in Vaca v. Sipes, i.e., that the actions against the union and the employer are separate causes of action, and, although closely related, the elements of the claims against the employer and the union are different, that the company is not an indispensable party in the action against the union, and that the cases can be decided separately and differently.

The petitioners have attempted to read into the decision of the Sixth Circuit an "unreasoned, unexplained

conflict among the circuits." (Petitioners' Brief, page 15). Nowhere in its decision did the Sixth Circuit repudiate, contradict, or otherwise conflict with this Court's decision in Vaca v. Sipes or with the decisions of other circuits following Vaca v. Sipes. All of the cases cited by the petitioners in their brief were situations in which there was no question but that the employer's discharge was wrongful. The only facts before the court were facts concerning the alleged unfair representation. In the cases cited by the petitioners in the instant case, and in the instant case itself, the courts have consistently held that where there has been proof of unfair representation the plaintiffs are entitled to prove wrongful discharge. In the instant case, however, the facts concerning the alleged wrongful discharge were also before the

court, and these facts are not disputed. This case is factually different from those cited by the petitioners for that reason. However, the legal issues and the decisions of the courts on these issues have been consistent. The only difference in the instant case from the cases cited by the petitioners is a difference of fact. In this case there is no legal proposition for the United States Supreme Court to consider, and there is no discrepancy of interpretation of the circuit courts for this Court to resolve. The Sixth Circuit did not vary from this Court's decision in Vaca, and therefore the petitioners' claim that the court must resolve this "conflict" is without merit.

In support of a Petition For Certiorari it is not sufficient for the petitioners to merely allege a vague and undefined conflict among the circuits.

Rather, before this Court should exercise its discretion to grant a Petition For Certiorari, the conflict must be substantial and obvious, which is not the case here.

> Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.' National Labor Relations Board v. Pittsburg S.S. Co., 340 U.S. 498, 71 S.Ct. 453 (1951).

In the instant case there is no "real and embarrassing conflict of opinion and authority." In fact, there is no conflict whatsoever. Therefore, the Petition should be denied.

The petitioners have also alleged that the "integrity of industrial grievance procedure" requires that the Court review the decision below. It is submitted that deference to the integrity of contractual

grievance procedures requires that this Court decline to grant the instant petition for certiorari. In this case, Respondent Anchor Motor Freight cooperated in the implementation of the grievance procedure for these petitioners. Anchor met with the union officials concerning the discharge at the local level. Anchor participated in the Joint Arbitration Committee hearings in Detroit on these grievances. Anchor again participated in the submission of the case to the Joint Arbitration Committee on a petition for a rehearing. These are the contractually agreed upon procedures. Anchor followed them in letter and spirit. This company, by its conduct, affirmed its belief in these grievance procedures as a "substitute for industrial strife." And, upon the completion and exhaustion of these grievance procedures, this company has every right to rely upon the decision rendered

through that procedure. It would be an affront to those procedures and would constitute a great weakening of the entire system of resolving disputes by the procedures agreed to during collective bargaining if this Court should allow the petitioners to use unsubstantiated and contradictory information which was obtained many months after the conclusion of the agreed upon procedures to reopen a case which has been contractually concluded. There would be no finality. Rather, a perpetual cloud would hang over each and every arbitral award. No decision would ever be final! In the instant case, Anchor did nothing wrong. It relied upon the integrity of its contractual dispute resolution machinery. If this Court grants the instant petition and allows the petitioners to reopen a matter which has been closed for many years, in the absence of any wrongdoing

by the employer, then the intregity of the contractual grievance procedure would be seriously undermined. On the other hand, a decision which would allow an innocent employer to rely on the negotiated procedures could hardly be described as a way of weakening the intregrity of the system.

CONCLUSION

For the reasons set forth herein, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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March 18, 1975

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of March, 1975, three copies of the foregoing Petition For A Writ Of Certiorari were sent by certified mail, return receipt requested, to the following attorneys for each other party separately represented, pursuant to Supreme Court Rule 33(1): Niki Z. Schwartz, Esquire, Attorney for Petitioners, 1100 Investment Plaza, Cleveland, Ohio 44114; David L. Uelman, Esquire, 211 West Wisconsin Avenue, Milwaukee, Wisconsin 53203; Knee, Snyder & Parks, 11 West Monument Building, Dayton, Ohio 45402; and Eugene Green, Esquire, 602 Stambaugh Building, Youngstown, Ohio 44503; attorneys for Respondent Unions.

Bernard S. Goldfarb